BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The United States Circuit Court Of Appeals For The Seventh Circuit rendered its opinion in this case on December 15, 1943, which is set forth at pages 181 to 188 of the Record. It is reported in 140 F. 2d 363-7.

JURISDICTION OF THIS COURT.

The judgments to be reviewed were entered by The Circuit Court Of Appeals For The Seventh Circuit on December 15, 1943; and on February 17, 1944, petitioner's petition for a rehearing was denied (R. 207). A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157 as amended February 13, 1935, c. 229, Sec. 1, 43 Stat. 938, 28 U.S.C.A. § 347).

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

For a Statement of the case and of the questions presented, see pages 1 through 8, above.

SPECIFICATION OF ERRORS.

The Seventh Circuit Court Of Appeals erred—

1. In affirming the judgment of the District Court in cause No. 8263; and in granting the motion to dismiss and dismissing the appeal in cause No. 8262.

2. In not reversing the judgment of the District Court in cause No. 8263; and in not denying the motion to dismiss the appeal, and in not entertaining and taking jurisdiction of the appeal in cause No. 8262.

3. In holding that petitioner was not entitled to a *permissive* right of intervention in the Bankruptcy Court in cause No. 8262 under Section 207 of Chapter X of the Bankruptcy Act and under Federal Rule Of Civil Procedure 24, merely because petitioner was not a party in interest having an *absolute* right of intervention under Section 206 of Chapter X of the Bankruptcy Act.

4. In holding that petitioner, who was a party in interest entitled to a *permissive* right of intervention under Section 207 of Chapter X of the Bankruptcy Act and Federal Rule of Civil Procedure 24, and who had filed her objections to the confirmation of the plan of reorganization in the Bankruptcy Court and been heard thereon, was not entitled to appeal because no formal order of intervention had been entered in the Bankruptcy Court.

5. In making findings of fact and conclusions of law directly contra to the sworn allegations of fact contained in petitioner's objections and pleadings filed in the District Bankruptcy and Equity Courts, without any affidavits or any evidence to sustain such findings, and without any hearing or trial of the facts upon the merits in the District Bankruptcy and Equity Courts.

6. In holding that the allegations in petitioner's verified complaint filed in the Federal Equity Court in cause No. 8263 did not state a valid cause of action.

ARGUMENT.

I.

The Parties in Interest Who Have a Permissive Right of Intervention in the Bankruptcy Court Under Section 207 of Chapter X of the Bankruptcy Act and Under Federal Rule of Civil Procedure 24 Are Not Limited to Those Parties in Interest Enumerated and Described as Having an Absolute Right of Intervention Under Section 206 of the Bankruptcy Act.

The Seventh Circuit Court Of Appeals in its opinion in cause No. 8262 has dismissed the bankruptcy appeal without any consideration of its merits upon the, as petitioner respectfully says, astonishing ground that Section 207 of the Bankruptcy Act and Federal Rule Of Civil Procedure 24 do not provide for or permit any *permissive* intervention in the Bankruptcy Court. In other words the Circuit Court in its opinion (R. 186) expressly and squarely holds that the *only* persons who can intervene in the Bankruptcy Court are those persons who are specifically described in Section 206 as having an *absolute* right of intervention, namely, "(1) the debtor, (2) the indenture trustees, and (3) any creditor or stockholder of the debtor." All that Section 207 and Rule 24 do, in the opinion of the Circuit Court, is to provide how the so-called "interested parties may come into the Bankruptcy Court *in an orderly manner*"; and the Circuit Court holds that Section 207 and Rule 24 do not grant any *permissive* right of intervention to interested parties except those who are specifically enumerated and described in Section 206 (R. 186, 188).

This is certainly a most extraordinary construction of

Section 207 and Rule 24; and it flies in the face of the clear language of both Section 207 and Rule 24, as well as being in conflict with all the decisions of this Court and of the other Circuits of Appeals. Its effect is to *nullify*, by judicial fiat, the legislative intentions as clearly set forth in the Bankruptcy Act and confirmed in Rule 24 promulgated by this Court.

A *permissive* right of intervention has existed in the Federal Courts ever since the formulation of Equity Rule 37; and when Equity Rule 37 was superseded by Federal Rule of Civil Procedure 24, the latter was made applicable to bankruptcy proceedings by General Order in Bankruptcy 37 (11 U.S.C.A. foll. §53). Moreover, when the Bankruptcy Act was re-enacted in 1938, it was one of the prime purposes of the re-enactment to *expand* the *permissive* right of intervention of parties in interest, even though they were not specifically described as entitled to an *absolute* right of intervention as defined in Section 206. So far as is known to petitioner, every court which has previously passed upon the right of intervention has invariably assumed and held that Section 207 was *not* a mere provision for the "orderly manner" in which the parties in interest as limited and defined in Section 206 might come into the Bankruptcy Court, but, on the contrary, that *Section 207* and *Rule 24 expanded the right of intervention* to include *permissive* intervention to intervenors who did not necessarily hold the same direct, personal or pecuniary interest in the bankruptcy proceedings as those persons who are enumerated and described in Section 206.

Section 206 of Chapter X of the Bankruptcy Act provides as follows:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding un-

der this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

Section 207 of Chapter X of the Bankruptcy Act provides as follows:

"The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given."

Federal Rule of Civil Procedure 24, reads:

"Rule 24. *Intervention.* (a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

"(b) *Permissive intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) When a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

In the face of the foregoing statutory provisions it is somewhat astonishing to learn from the Circuit Court of Appeals opinion in this case, for the first time, that there

is no such thing as the right of "permissive intervention" in bankruptcy cases.

The Circuit Court Of Appeals opinion in this respect, we submit, is directly contra to the decision of this Court in the case of *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, (1940) 310 U. S. 434, 84 L. Ed. 1293. The Circuit Court of Appeals in that case had held that the Securities and Exchange Commission had no such special interest as to entitle it to intervene as of right in a proceeding under Chapter XI of the Bankruptcy Act and concluded that the District Court erred in permitting the intervention and that from this it followed that the Commission had no right to appeal. This Court held that neither Chapter X nor Chapter XI of the Bankruptcy Act in terms gives a right of intervention, and that therefore the Commission's right to intervene was governed by the Rules of Civil Procedure and the general principles governing intervention. This Court (Headnote 11, page 459) said:

> "Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by paragraph 37 of the General Orders for Bankruptcy, authorizes 'permissive intervention.' It directs that 'upon timely application anyone may be permitted to intervene in an action * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' *This provision plainly dispenses with any requirement that the intervenor shall have a direct, personal or pecuniary interest in the subject of the litigation. Cf Pennsylvania* v. *Williams*, 294 U. S. 176, 79 L. Ed. 841, *supra*." (Italics ours.)

Even the dissenting opinion in that case, while holding that the Commission had no right of intervention because

it had no interest which would be bound by a judgment in the action, nevertheless agreed with the majority opinion in holding that Rule 24 clearly granted a *permissive* right of intervention to parties in interest who had been adversely affected "by any decision of law or fact by the court."

Similarly, in *Seaboard Terminal Corporation* v. *Western Maryland Ry. Co.* (1940) 108 F. 2d 911 the Fourth Circuit Court of Appeals held that a third party claimant has a *permissive* right to intervene under Section 207 and Rule 24; and that even if this were not the case *Section 207 is not a restriction upon "the ordinary rules of intervention."*

Also, in *Klein* v. *Nu-way Shoe Co.* (1943) 136 F. (2d) 986 (4-5), the Second Circuit Court of Appeals held that a party in interest not described in Section 207 had a *permissive* right of intervention to contest for fraud an involuntary adjudication in bankruptcy under Rule 24 of the Federal Rules Of Civil Procedure.

We think it most significant that the Seventh Circuit Court Of Appeals in its opinion in this case does not quote from subparagraphs (a) and (b) of Rule 24 of the Federal Rules of Civil Procedure, but contented itself merely with citing sub-paragraph (c) thereof. Sub-paragraph (c) relates only to "procedure" on intervention; whereas subparagraphs (a) and (b) relate to the *absolute* and *permissive rights* of intervention of parties in interest, subparagraph (b) being specifically headed "Permissive Intervention."

What can be said in favor of the Circuit Court's opinion that Section 207 and Rule 24 merely provide *"an orderly manner"* in which the parties in interest, as limited and defined in Section 206, may intervene is not known to petitioner. Suffice it to say that under neither reasoning nor authority is there the slightest justification for this extraordinary holding.

II.

Persons Who Have a Permissive Right of Intervention in the Bankruptcy Court Under Section 207 of Chapter X of the Bankruptcy Act and Under Federal Rule of Civil Procedure 24, and Who Have Appeared and Been Heard Therein, May Appeal, Even Though No Formal Order of Intervention Has Been Entered in the Bankruptcy Court.

As we have shown above, it was one of the prime purposes for the enactment of the Bankruptcy Act of 1938 and the promulgation of the new Federal Rules Of Civil Procedure to protect the rights of parties in interest having a *permissive* right of intervention thereunder.

Before the enactment of the Bankruptcy Act of 1938 and the new Federal Rules of Civil Procedure, the Seventh Circuit Court Of Appeals had held that a formal order of intervention was necessary before the intervener could appeal. The Tenth Circuit had held *contra.*

(*In re Foreman Trust and Savings Bank* (C. C. A. 7) (1936) 85 F. 2d 942; *Mercantile Trading Co.* v. *Rosenbaum Grain Corp.* (C. C. A. 7) (1936), 83 F. 2d 391; *Harkins* v. *Milwaukee & S. Bldg. Corp.* (C. C. A. 7) (1935), 79 F. 2d 478. But see *Rowan* v. *Harburney Oil Co.* (C. C. A. 10) (1937), 91 F. 2d 122, *contra.*)

But since the enactment of the Bankruptcy Act of 1938 and the promulgation of the new Federal Rules Of Civil Procedure, all of the Circuit Courts Of Appeals have unanimously held that any party in interest has a standing to appeal whenever he has the right to be and has been heard in reorganization proceedings under the Bankruptcy Act. The instant decision by The Seventh Circuit is *contra to* the following *five decisions* of *four other Circuit Courts*:

Klein v. *Nu-way Shoe Co.*, (C. C. A. 2, 1943) 136 F. 2d 986;

Dana v. *Securities and Exchange Commission* (C. C. A. 2) (1942), 125 F. 2d 542;
In re Keystone Realty & Holding Co. (C. C. A. 3) (1941), 117 F. 2d 1003;
Rogers v. *Consolidated Rock Products Co.* (C. C. A. 9) (1940), 114 F. 2d 108;
Seaboard Terminal Corp. v. Western Maryland Ry. Co. (C. C. A. 4) (1940), 108 F. 2d 911.

The Seventh Circuit Court of Appeals in this case itself has clearly recognized that it was not the lack of a *formal order* granting leave to intervene which barred the right of appeal in this case, for it holds in the decision here appealed from that "*formal* intervention was not required" where an intervenor has an absolute right of intervention under Section 206 (R. 187). On the contrary, the Seventh Circuit Court of Appeals in this case squarely holds that petitioner was not entitled to appeal, *not* because she did not obtain an order of "formal intervention," but because she was not "an interested party" as defined under Section 206 and because no *permissive* right of intervention exists under Section 207 and Rule 24. The Court said (R. 188 and in 140 F. 2d 363, at bottom page 367):

> "A standing as a party to the record was necessary before one could appeal. *Such standing was given* by statute *to interested parties* ONLY *as defined by* Sec. 206 of Chapter 10. The appellant is not such a party.
> "* * * She is a stranger to the record *because the court had no right to recognize her as a party in interest.* Only the parties in interest may appeal. *Since the appellant was not a party in interest and could not become a party to the record, she has no standing to appeal.*" (Italics ours.)

In other words the Circuit Court held that petitioner could not possibly intervene because she was not (1) the debtor, (2) the indenture trustee or (3) a creditor or stock-

holder of the debtor, *these being (according to the Circuit Court) the only persons who could conceivably intervene.* Even the Circuit Court of Appeals recognized that if petitioner had a right of intervention, whether peremptory or otherwise, a "*formal intervention* was *not* required."

Thus, according to all the authorities to date, including the Circuit Court's decision here appealed from, petitioner has a right of appeal if—but only if—she has a right of intervention, without regard to whether a *formal* order of intervention has been entered below.

Petitioner respectfully submits that the Circuit Court's decision denying her a right of permissive intervention under Section 207 and Rule 24 is plainly wrong, and that she is entitled as of right to appeal from an order denying that right.

III.

Petitioner Has Been Deprived of $420,000 "Without Due Process of Law" Under the Fifth and Fourteenth Amendments Because the Purported "Findings of Fact" Upon Which the Circuit Court Has Acted Were Not Supported by Any Evidence or Trial Upon the Merits and Are Directly Contradictory to (1) Petitioner's Verified Objections Filed With Leave of the Bankruptcy Court in the Reorganization Proceedings and (2) Petitioner's Verified Complaint in the Federal Equity Court.

Petitioner's sworn objections in the bankruptcy case and petitioner's sworn complaint in the equity case both state facts from which it affirmatively appears that petitioner will be defrauded of her 1/3 minority stockholder's rights in The Hump Company of a value of $420,000 if the order of confirmation of the plan of reorganization is to be affirmed.

We have shown in our "Summary Statement Of Matter Involved" that petitioner's sworn allegations show con-

clusively that The Hump Company will receive no adequate consideration for the $1,260,000 proposed and required to be paid by The Hump Company and its subsidiaries under the plan of reorganization in order to "bail out" the majority stockholder's individual obligation as guarantor of the Debtor's $853,000 bond issue, a debt with which neither The Hump Company nor petitioner has any connection whatever (R. 60-64). We have also shown that the Circuit Court Of Appeals found and stated as a fact that there was substantial consideration for this payment of $1,260,000. But we have also shown that these findings were directly contradictory to the sworn statements in petitioner's bankruptcy objections and equity complaint and that the Circuit Court has made these findings *without any hearing or proof of the facts upon the merits of the controversy whatsoever.* Nor did the Federal Bankruptcy and Equity Courts below grant any trial or hearing upon the merits at which any evidence was offered or received on these issues (R. 89-96).

Indeed the entire first five pages of the Circuit Court's opinion (R. 181-5) is devoted to a statement of purported "facts" *which are derived entirely from the bare unsupported statements made in the briefs filed by the appellees in the Circuit Court,* and *not* from the record, in so far as the fraud, *ultra vires* acts and gross mismanagement of the Hump Company and its subsidiaries charged by petitioner are concerned.

The record also plainly shows that in the equity case in the trial court, petitioner's motion for a preliminary injunction was denied (R. 146-8) (without a finding that there was no equity in the complaint); and that on appeal to the Circuit Court that Court not only affirmed the order denying petitioner's motion for a preliminary injunction, but also found and concluded that petitioner's verified complaint "did not state a cause of action" because "There are

no allegations in the complaint of fraud or gross mismanagement or of facts showing *ultra vires* acts. The appellant (petitioner) simply finds fault with the business judgment of the officers and directors of Hump. It is elementary that this is no basis to support a suit by stockholders. Fletcher's Cyclopedia of Corporations, Sec. 4065, Vol. 6, pages 6923-4" (R. 184-5).

Petitioner submits that it is a plain violation of the Fifth and Fourteenth Amendments to the Federal Constitution for the Seventh Court Of Appeals to have made any such purported findings of fact without a trial or hearing of the facts on the merits in the lower court, and especially since such findings are directly contradicted by the sworn allegations to the contrary in petitioner's bankruptcy objections and equity complaint (R. 60-64).

The Fifth and Fourteenth Amendments provide (U. S. C. A. Const. Amends. V, part 1, page 172; and XIV, § 1, part 3, page 69) that no person shall be deprived of property, without "due process of law." The Supreme Court in *Holden* v. *Hardy* (1897) 169 U. S. 366 at bottom 389-390, 42 L. Ed. 780, held that "due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's property shall be taken for the benefit of another, without compensation, and requires that no one shall be condemned in his person or property without an opportunity to be heard in his own defense. From the opinion (at bottom page 389 and top 390), we quote:

> "It is sufficient to say that there are certain *immutable principles of justice* which inhere in the very idea of free government which no member of the Union may disregard, as that *no man shall be condemned in his * * * property without * * * an opportunity of being heard in his defense.*" (Italics ours.)

Again in *Ochoa* v. *Hernandez* (1913) 230 U. S. 139, 57 L. Ed. 1427, this Court again held (at top page 161):

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that *it inhibits the taking of one man's property and giving it to another*, contrary to settled usages and modes of procedure, and *without* * * * an opportunity *for a hearing.*" (Italics ours.)

There are many other decisions to the same effect. See *Truax* v. *Corrigan* (1921) 257 U. S. 312, 66 L. Ed. 254, reversing (1918) 176 Pac. 570.

Petitioner urges that it is particularly unfair to deprive her of her stockholder's rights in The Hump Company and its subsidiaries by the confirmation of a plan of reorganization *in view of the decision of this Court* in *Stoll* v. *Gottlieb* (1938) 305 U. S. 165 (2) and at 170-7, holding that an adjudication in the Bankruptcy Court of any such right as is here asserted by petitioner would be fully within the jurisdiction of the Bankruptcy Court and that a decree entered therein upon a proper hearing would be *res judicata* of petitioner's rights. The effect of the *Stoll* case is to permit the assertion in reorganization proceedings under the Bankruptcy Act of all claims of parties whose rights and interests are directly affected by the reorganization. This includes such claims as petitioner is here asserting. In both Judge Hand's majority opinion and in the very able dissenting opinion of Judge Clark in the case of *Commercial Cable Staffs' Association* v. *Lehman* (1939) 107 F. 2d 917, which was an appeal in a reorganization proceeding under Section 77-B of the Bankruptcy Act of 1898 and not under Chapter X of the Chandler Act, it was agreed that an adjudication in the Bankruptcy Court of any such rights as are here asserted by petitioner would, under the *Stoll* case, be fully within the Bankruptcy Court's jurisdiction, and that a decree en-

tered therein, such as the decree here confirming the plan of reorganization, upon a hearing of the case on its merits, would be *res judicata* not only in that proceeding but in the Federal equity action or anywhere else.

In other words, reading the *Stoll* v. *Gottlieb* and the *Commercial Cable* cases together, petitioner has the absolute right to protect her interests *at a trial or trials on the merits* in either or both of these proceedings now on appeal to this Court. Unless this Court grants a writ of certiorari herein, however, petitioner will be deprived of this right.

Petitioner seeks a writ of certiorari in this case for the very reason that in both the Federal bankruptcy and equity cases the District Court and the Circuit Court of Appeals have now deprived petitioner of her rights without any hearing or trial upon the merits whatsoever.

Our opponents do not deny that this Court has held in *Manhattan Bros. Inc.* v. *Irving Trust Co.* (1934) 291 U. S. 320 that any claim for future rent alleged to form part of the consideration for the payment by The Hump Company of $1,260,000 under the plan of reorganization was *absolutely void*. Nor do our opponents deny that no corporation has the power to assume and pay the debt of another without consideration. *Withers* v. *Green* (1850) 50 U. S. 213; *National Electric Signaling Co.* v. *Fessenden* (1913) 207 F. 915; *Heartt* v. *Sherman* (1907) 229 Ill. 581, 82 N. E. 417.

Nor do our opponents deny that it is clearly and unmistakably shown by affirmative facts set forth in petitioner's verified objections and complaint, that the other alleged consideration "of large proportions," as found by the Circuit Court Of Appeals in its opinion (R. 184), consisted of (1) new stock which would be worthless until $1,260,000 of the Hump Company's money had been used

to pay off the $853,000 debt, with interest, personally guaranteed by Sol H. Goldberg, and (2) that the Estate of Sol H. Goldberg was or would be "utterly insolvent and unable to pay all or any substantial part of said sum of $853,000, by reason whereof the assignment of said claim based upon such guaranty is totally inadequate consideration" for the loss to The Hump Company and its subsidiaries of $1,260,000 (R. 61-63).

All that our opponents can do is to say that *in their briefs filed in the Circuit Court of Appeals* they made the *naked and wholly unsupported statement* that there was adequate consideration for petitioner's loss, and that the Circuit Court Of Appeals opinion accepts this purported fact as a conclusion *and without any evidence in the record to sustain it.*

To deprive petitioner of her property rights to $420,000 on any such basis is, as we submit above, a plain violation of petitioner's Constitutional rights in that such action will deprive petitioner of her property "without due process of law."

Conclusion.

We conclude therefore:

1. That petitioner has been unlawfully deprived by the decision in the Seventh Circuit Court Of Appeals of her *permissive* right of intervention as a party in interest under Section 207 of Chapter X of the Bankruptcy Act and under Federal Rule Of Civil Procedure 24, and that petitioner thereby unlawfully will be deprived by the orders appealed from of $420,000 of her property, unless this petition for a writ of certiorari be granted.

2. That the holding of the Circuit Court Of Appeals that no party in interest has a *permissive* right of intervention in bankruptcy reorganization proceedings, except those persons who are specifically defined in Section 206

of Chapter X of the Bankruptcy Act, is without the slightest warrant in the law or in the decided cases in this Court and in the other Circuit Courts Of Appeals.

3. That no *formal* order of intervention is necessary to permit petitioner to appeal after she has filed her objections in the Bankruptcy Court *with leave of that court, and has been heard there,* provided that she has a *permissive* right of intervention under Section 207 and Rule 24.

4. That none of the purported facts found and stated by the Circuit Court Of Appeals in its opinion, on the basis of which it concludes that petitioner is not being defrauded of $420,000 of her property, is supported by any reference to the record. There was no trial or hearing of either case on the merits in the Federal Bankruptcy or Equity Court below, and the record therefore does not, and cannot, contain any evidence to sustain such assumed facts.

5. That, particularly in view of the *Stoll* v. *Gottlieb* case granting the Bankruptcy Court full jurisdiction to determine petitioner's right to prevent $1,260,000 belonging to the corporation in which she is a one-third minority stockholder, from being taken and given without consideration to a new corporation to be created under bankruptcy reorganization proceedings of another corporation having no connection whatsoever therewith, petitioner has been deprived of her property "without due process of law" under the Federal Constitution by virtue of the decision of the Seventh Circuit Court Of Appeals.

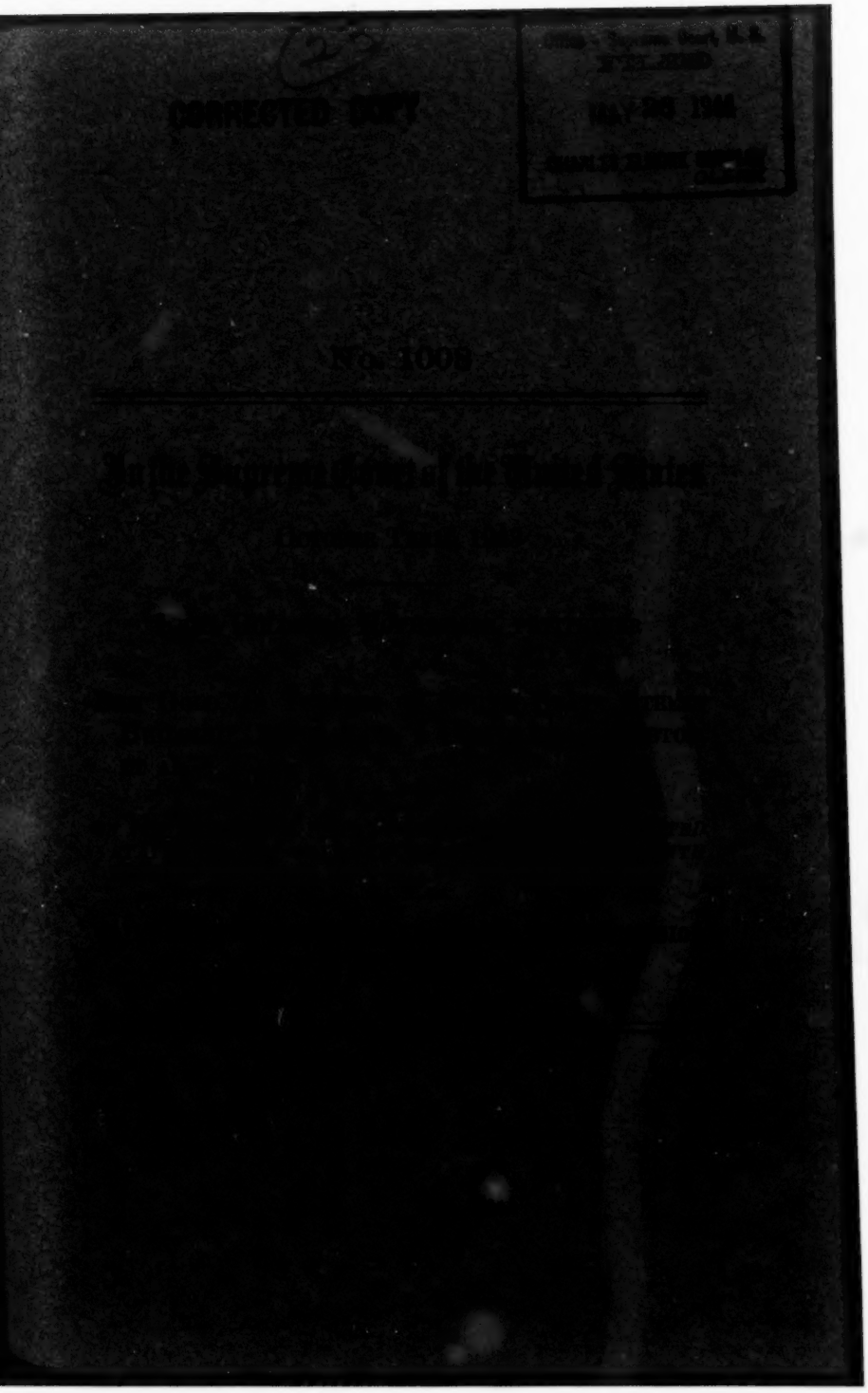
Petitioner, therefore, prays that the order of The Circuit Court Of Appeals For The Seventh Circuit dismissing her appeal in the bankruptcy case and the holding of the Circuit Court that petitioner's verified complaint in the equity action states no cause of action, and its affirmance

of the order of the equity court denying petitioner's motion for a preliminary injunction, both should be reversed; and that this Court should remand both causes with directions to proceed to a hearing and trial upon the merits of petitioner's verified objections in the bankruptcy case and her verified complaint in the equity case.

Respectfully submitted,

CHARLES RALPH JOHNSTON and
HAROLD M. KEELE
Attorneys for Petitioner

CHARLES RALPH JOHNSTON and
MYRON FRANTZ
Of Counsel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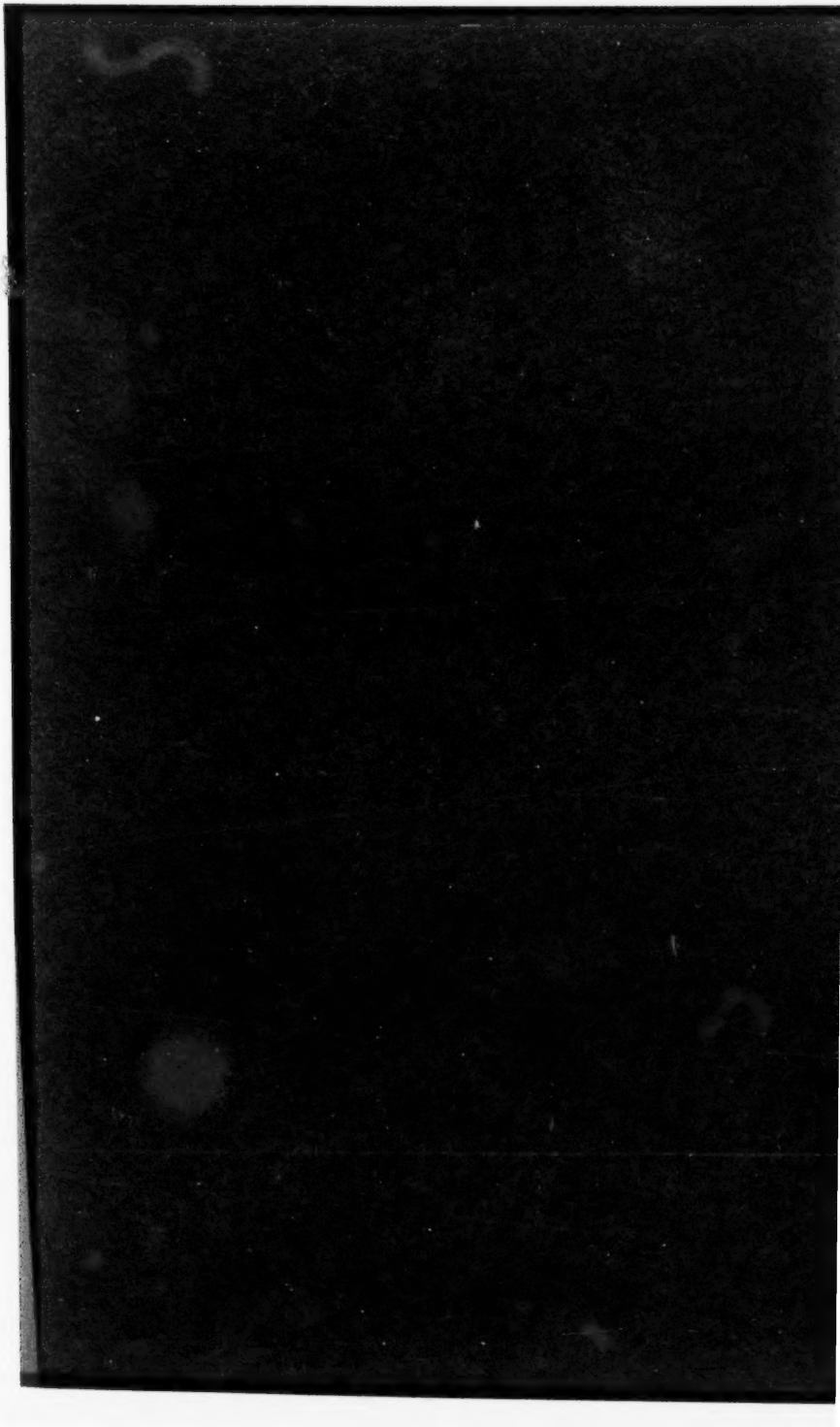

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589218—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 1008

REKA GOLDBERG HOFHEIMER, PETITIONER

v.

BEN GOLD, AS TRUSTEE OF SOUTH STATE STREET BUILDING CORPORATION, A CORPORATION, DEBTOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

PRELIMINARY STATEMENT

The Securities and Exchange Commission, pursuant to Section 208 of the Bankruptcy Act (Act of June 22, 1938, c. 575, sec. 1, 52 Stat. 894, 11 U. S. C. sec. 608), became a party to the present proceeding for the reorganization of South State Street Building Corporation under Chapter X of the Bankruptcy Act in the District Court for the Northern District of Illinois and participated as an appellee before the Circuit Court of Appeals

(R. 123–126, 170–177). The Commission was not a party to the equity action entitled *Reka Goldberg Hofheimer* v. *David McIntee, et al.,* either in the District Court or on appeal in the circuit court of appeals. Although the petition seeks review of the actions of the court below both in the bankruptcy proceeding (No. 1008 in this Court) and in the equity action (No. 1009 in this Court), the Commission's interest is limited to the bankruptcy proceeding. This brief is, therefore, limited to opposing review of the judgment of the circuit court of appeals dismissing petitioner's appeal from the confirmation of the modified plan of reorganization of the debtor.

OPINION BELOW

The opinion of the circuit court of appeals (R. 181–188) is reported in 140 F. (2d) 363.

JURISDICTION

The judgment of the circuit court of appeals was entered December 15, 1943 (R. 189). A petition for rehearing was denied February 17, 1944 (R. 207). The petition for a writ of certiorari was filed May 17, 1944. Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner, who is not a creditor or stockholder of the debtor corporation, was such

a party in interest in the reorganization proceeding as entitled her to appeal without first having sought and obtained permission to intervene.

2. Whether the bankruptcy court's refusal to adjudicate the claim of the petitioner, or to withhold confirmation of the plan pending the adjudication of the claim in another tribunal, deprived her of property without due process of law.

STATUTE INVOLVED

Section 206 of the Bankruptcy Act, as added by the Act of June 22, 1938, c. 575, sec. 1, 52 Stat. 894 (11 U. S. C. § 606), provides in part:

> The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. * * *

Section 207, as similarly added (11 U. S. C. § 607), provides in part:

> The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. * * *

Section 24, as amended, 52 Stat. 854 (11 U. S. C. § 47), provides in part:

> a. The Circuit Court of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with

appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

STATEMENT

Proceedings for the reorganization of South State Street Building Corporation, hereinafter referred to as debtor, were instituted on October 17, 1938, by the filing of a creditors' petition under Chapter X of the Bankruptcy Act (R. 3–4). Upon approval of the petition, respondent Ben Gold was appointed trustee of the debtor (R. 4).

The assets of the debtor consist principally of a leasehold estate in certain property improved with a seven story building located at 32 South State Street, Chicago, Illinois (R. 4), and certain claims against the estate of Sol H. Goldberg and against Chain Store Products Corporation

(hereinafter referred to as Chain Store) (R. 6–7). The business of debtor is the operation and management of a building which was erected in 1928 for the purpose of leasing to a single tenant, McCrory Stores Corporation (hereinafter referred to as McCrory) (R. 5). The principal liabilities of the debtor are a rental indebtedness of approximately $211,000 owing to the lessor, the Board of Education of the City of Chicago (R. 7), and its first mortgage leasehold bonds outstanding in the aggregate principal amount of $853,000 (R. 4). These bonds are also secured by the personal guaranty of Sol H. Goldberg, who died in June, 1940 (R. 4). Goldberg organized the debtor (R. 5) and owned 198 of the 200 shares of its outstanding stock (R. 50).

At debtor's inception in 1928 Goldberg in its behalf negotiated a sublease of the premises to McCrory, which went into bankruptcy in 1933 and into reorganization under section 77B in 1934 (R. 5–6). Upon the disaffirmance of debtor's sublease by the trustee in bankruptcy of McCrory, debtor filed a substantial claim for damages in the 77B proceedings (R. 6). This claim is treated in the plan as having had a value of approximately $830,000 (R. 6). It appears that Chain Store and Goldberg individually also asserted claims against McCrory. In 1935 Goldberg caused the sale to certain New York interests of debtor's claim together with the claims of Chain Store and Gold-

berg for a consideration paid as follows: $250,000 to debtor; $385,000 to Chain Store; and certain valuable options to purchase stock of the reorganized McCrory which were divided 50% to Goldberg and 50% to Chain Store (R. 7).

In the present proceeding the trustee of debtor took the position that the claims of Chain Store and Goldberg were without validity and that all of this consideration should have been paid to the debtor (R. 7). After negotiations by the trustee with representatives of the bondholders and representatives of the Goldberg interests, a compromise and settlement of all causes of action of the debtor, the trustee, and the bondholders against the Goldberg interests was agreed upon (R. 9–11), and the terms thereof set forth in a plan of reorganization filed by the trustee on February 12, 1941 (R. 2–23).

This plan provided for contributions by the Goldberg interests (Goldberg Properties Trust, R. 4–5) of $40,000 to $42,000 per year for 22 years secured by a pledge of the equity income from five building corporations owned by Goldberg Properties Trust (R. 12–13), and for the transfer of all the stock of the reorganized company to Goldberg Properties Trust upon retirement of the proposed new bonds (R. 11–12). It was approved by the court, but failed of confirmation because of the inability of the Goldberg interests to effect a settlement of the claim of the Board of Education of the City of Chicago upon the terms stated in the plan (R. 24).

After further negotiations the trustee on November 10, 1942, filed modifications of the plan (R. 23–43) and as thus modified the plan was approved by the district court on November 25, 1942 (R. 51–52), accepted by the requisite majority of each class of creditors affected (R. 75), and confirmed by order of court on December 15, 1942 (R. 82–83).

Under the modified plan the Board of Education is to receive all of the net income of the building of the debtor to apply upon the $211,000 indebtedness with interest (R. 26–27), and Goldberg Properties Trust is required to make contributions of $45,000 per year for 12 years, and $48,000 per year for 15 years thereafter, secured in the same manner and by the same five properties as provided in the original plan (R. 26, 32). New bonds to be issued to present bondholders will mature in 27 years, bear 3% fixed interest, and will be retired through the operation of a sinking fund (R. 29–30). Goldberg Properties Trust is to receive an assignment of the claim against the estate of Sol H. Goldberg based on Goldberg's guaranty of the debtor's outstanding bonds (R. 42). The provision in the original plan relating to the transfer of the stock of the reorganized company to Goldberg Properties Trust (R. 11–12) is retained in the modified plan (R. 30).

The petitioner first participated in these proceedings at the hearing on the modified plan. She is neither a creditor nor a stockholder of the

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debtor, but claims that she has standing in the reorganization proceeding because the contributions to be made under the plan by Goldberg Properties Trust will be injurious to her as a minority stockholder of an indirect parent of the trust (R. 56, 60).[1] On this theory she filed objections to the plan (R. 54), incorporating verbatim her amended and supplemental complaint in an equity action pending in the district court entitled *Reka Goldberg Hofheimer* vs. *David McIntee, et al.* (R. 55–67) (No. 1009 in this Court). That complaint seeks an injunction restraining the Goldberg interests from making or agreeing to make the contributions required by the modified plan (R. 65).

Petitioner was permitted to be heard in argument on these objections, but the bankruptcy court overruled the objections without determining the merits of her claims as set forth in the complaint in the equity suit (R. 74), and entered a decree confirming the plan of reorganization (R. 83). To petitioner's counsel, the court stated (R. 95):

> I do not believe that you do have any place in these proceedings, I don't think

[1] Petitioner's claim of injury arises from the fact that she is a minority stockholder of the Hump Hairpin Manufacturing Company, that Hump Hairpin Manufacturing Company owns all the common stock of Chain Store, and that Chain Store owns all the certificates of beneficial interest of Goldberg Properties Trust. She urges that the contributions to be made under the plan by the Goldberg Properties Trust are without consideration and will affect the value of her holdings in the Hump Hairpin Manufacturing Company.

> you have any place here, your client, I mean. I don't think I should allow the pleadings here to be cluttered up with motions made by her or by pleadings filed by her. * * * you haven't any place in this court in my opinion.

Petitioner appealed from the order confirming the modified plan of reorganization (R. 96). The appeal was dismissed by the circuit court of appeals (R. 189) on the ground that petitioner had no standing to appeal (R. 181–188). In that court the petitioner also presented her appeal from an order of the district court in the equity suit denying her a temporary injunction to restrain the contribution by the Goldberg interests under the plan. The circuit court of appeals affirmed the order of the district court in this respect (R. 181–185). The petition is directed to both these orders of the court below. As already noted, *supra,* p. 2, [redacted] this answer concerns itself only with the bankruptcy proceeding.

ARGUMENT

1. Section 206 of the Bankruptcy Act, *supra,* p. 3, gives to a creditor or stockholders of the debtor the right to be heard and a standing to appeal in Chapter X proceedings without formal intervention. Petitioner is not nor does she claim to be a creditor or stockholder of the debtor. She has merely an indirect minority interest in a corporation which has no interest in the debtor, but

against which the debtor has a claim. Therefore, petitioner clearly had no standing to appeal under Section 206 from the confirmation of the plan.

Petitioner contends, however, that since she had a "permissive right" to intervene under Section 207 of the Act, *supra,* p. 3, and Rule 24 of the Federal Rules of Civil Procedure, her participation in the proceedings by filing objections to the plan and making motions incidental thereto[2] gave her a standing to appeal under Section 207 even though she did not formally intervene (Pet. p. 10).[3] Section 207 and Rule 24 (c)[4] by their terms negative such contention. Under Section 207 not only must the applicant for intervention be a

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[2] The record shows an order of the court extending the time within which she might file objections to the modified plan (R. 53), an order overruling her objections (R. 74) and an order giving her leave to file a copy of a motion, filed in the equity action, to strike her amended and supplemental complaint (R. 88), which order was vacated the following day (R. 95).

[3] A considerable portion of the petition is devoted to the argument that persons other than creditors and stockholders may be permitted to intervene in bankruptcy proceedings. In this connection *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, is cited. This proposition we believe to be clearly correct but we find nothing in it which in any way assists petitioner. The occasion for this argument apparently is a misreading of some language in the circuit court of appeals' opinion which the petitioner construes as a declaration that only creditors and stockholders who have an absolute right to participate under Section 206 may file petitions to intervene. While some of the language of the court taken out of context may give this impression, it seems

party in interest but he must show cause sufficient to persuade the court, in the exercise of a reasonable discretion, to permit intervention. And under Rule 24 (c) the applicant must file a motion to intervene or at least request intervention. Petitioner made no attempt to intervene under Section 207 in the manner provided by Rule 24 (c). No order allowing intervention was ever entered. Further, the court clearly indicated that it was opposed to permitting her to intervene (R. 95).

Petitioner cannot argue that the participation which the court allowed her was the equivalent of permitting intervention. The record makes it clear that the court did not regard her as party in interest but listened to her objections solely for the purpose of determining whether she had any proper place in the proceedings. Once petitioner's contention and alleged interest were made clear, the court specifically stated its belief that she had "no place" in the bankruptcy proceedings. The court below properly held that petitioner's

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to us clear that the court was dealing only with the specific situation before it—that of a person with only a remote, if any, interest in the proceedings, and one who had neither sought nor been granted a right to intervene.

[4] Rule 24 (c) provides:

"PROCEDURE.—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. * * *"

participation in the proceeding did not constitute intervention and gave her no standing to appeal. *In re Trust No. 2988 of Foreman Trust & Savings Bank,* 85 F. (2d) 942 (C. C. A. 7th), certiorari denied, 297 U. S. 707; *In re Kenmore-Granville Hotel Co.,* 92 F. (2d) 778 (C. C. A. 7th), certiorari denied, 302 U. S. 767; *Public Service Commission of Pennsylvania* v. *Philadelphia Rapid Transit Co.,* 82 F. (2d) 481 (C. C. A. 3rd), certiorari denied, 298 U .S. 673.[5]

There is no conflict of decisions. Petitioner argues that various circuit courts of appeals have held that a person in her position has a standing to appeal whenever he has been heard in the bankruptcy court (Pet. p. 19). The cases cited (Pet. pp. 19–20) do not support that contention.

Most of these cases deal with the effect of Section 206 of Chapter X, giving any creditor or stockholder of the debtor a standing to be heard as of right upon various issues arising in the proceeding. This statutory right to be heard has been held to carry with it a right to appeal without formal intervention. *In re Keystone Realty Holding Co.,* 117 F. (2d) 1003 (C. C. A. 3rd) (Chapter X); *Rogers* v. *Consolidated Rock Products Co.,* 114 F. (2d) 108 (C. C. A. 9th) (Section

[5] These cases arose under 77B. While Chapter X gives to creditors and stockholders the right to be heard on all matters in the proceeding, it gives no greater right of appeal except by virtue of this broadening of the right to be heard. Since petitioner is neither a creditor nor a stockholder, her situation is no different under Chapter X than under 77B.

77B). Inasmuch as intervention is unnecessary to lay the foundation for appeal, it has in fact been held proper to deny intervention. *Dana* v. *S. E. C.*, 125 F. (2d) 542 (C. C. A. 2d).[6] In *Klein* v. *Nu-Way Shoe Co.*, 136 F. (2d) 986 (C. C. A. 2d) and *Seaboard Terminals Corp.* v. *Western Maryland Ry. Co.*, 108 F. (2d) 911 (C. C. A. 4th), stockholders or creditors had been permitted by the district court to intervene, in the former case upon a somewhat informal application. There was no question as to their direct interest in the proceeding. None of these cases holds that one not a creditor or stockholder of the debtor and not having a standing to participate as of right acquires any standing to appeal by being permitted to be heard without formal intervention. Certainly none of them suggests the existence of a right to appeal on the part of a person who is regarded by the court as having "no place" in the proceeding.[7]

2. Petitioner contends that the bankruptcy court's refusal to adjudicate the merits of her claim in the equity action, which constituted her objections to the plan of reorganization, deprived her of property without due process of law (Pet.

[6] In fact in some courts it has been held that it is error to permit intervention. *In re Flour Mills of America*, 27 F. Supp. 559 (W. D. Mo.).

[7] The appeal cannot be regarded as in substance an appeal from a denial of intervention. Not only was no order for intervention sought and no order of denial entered, but an appeal therefrom in a bankruptcy proceeding would have

pp. 21–26). The only allegation in the equity suit which could have any conceivable relation to the bankruptcy proceeding was the claim that the contribution to be made under the plan by Goldberg Properties Trust was without consideration and was consequently injurious to her as a stockholder of its indirect parent. It is doubtful whether the bankruptcy court would have had a right to adjudicate such a claim even if it seemed convenient to do so. In any event it is clear that it had no duty to do so. See *Commercial Cable Staffs' Association* v. *Lehman*, 107 F. (2d) 917 (C. C. A. 2d). The court in that case stated (p. 920):

> The statute under which the proceeding is conducted—§ 77B of the Bankruptcy Act—like its successor, Chapter X, 11 U. S. C. A. § 501 et seq., is concerned with the reorganization of corporations as such, and with them alone. That does not mean that it stands upon the fictional legal person of the corporation; * * * But it does mean that the reorganization is to be confined to the readjustment of the relations between the shareholders collectively

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to be taken directly and not from the final decree. Cf. Section 24 (a), *supra*, pp. 3–4; *Dana* v. *S. E. C.*, 125 F. (2d) 542 (C. C. A. 2); compare *Allen Calculators, Inc.* v. *The National Cash Register Co.*, No. 592, present Term, decided May 1, 1944. Even if the present appeal could be regarded as one to review a denial of intervention, the action of the district court would have to be affirmed as a proper exercise of discretion, for the reasons stated herein at pp. 13–17, dealing with petitioner's claim of denial of due process of law.

> and their creditors (including relations between sub-groups of shareholders inter se and between them and creditors); and that the bankruptcy court shall not bring into a concourse the relations between the shareholders, i. e., the corporation, and third persons other than creditors. * * * In harmony with this premise the statute does not therefore attempt to adjust the relations of the shareholders of a parent with the creditors of a subsidiary, even though the subsidiary be wholly owned and though its creditors are for that reason creditors of the same group of shareholders.

To be sure, the petitioner's claim in the equity suit was of such a nature as to render consummation of the plan impossible if petitioner should be successful. Thus the bankruptcy court properly could take into consideration the existence of the equity suit and its chances of success. The court could have withheld confirmation of the plan until it was determined what the outcome of the equity suit would be. But whether to withhold action was a question addressed to the sound discretion of the court in the interest of the orderly administration of the estate. *Cf. Landis* v. *North American Co.*, 299 U. S. 248. Obviously, in the exercise of its discretion, an important factor was the likelihood that the plaintiff in the equity suit would be successful. If the court had believed there was a substantial likelihood that the plaintiff would be successful, the court would have been

well advised to withhold its action and refuse to confirm a plan which might never in fact be consummated. On the other hand, if the court believed the chances of success of the plaintiff in the equity action were slight, it could properly proceed with the confirmation and place the plan in operation without permitting the delays which would result from withholding confirmation until the determination of the equity action.[8]

[8] The court, having considered and overruled the objections to the plan raised by the Goldberg Estate (R. 43, 47, 48, 49), which were substantially the same as those of the petitioner, and being familiar with all the facts concerning the disputed claims and negotiations leading to the compromise, was in a peculiarly favorable position to determine whether there was sufficient consideration for the settlement. The court was of opinion that there was sufficient validity to the claim of the debtor against Chain Store to support the compromise (R. 79–80). The court's refusal to delay the prompt disposition of the case was therefore an informed exercise of sound discretion. See *Landis* v. *North American Co.*, 299 U. S. 248, 254.

Furthermore, it was a correct exercise of discretion. Petitioner's principal objection to the plan rested on the contention, based on *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320 (Pet. p. 25), that debtor's claim for future rent against the trustee of McCrory was not provable, and that debtor's claim for past rent was not adequate consideration for the undertakings by Goldberg Properties Trust in the settlement under the plan. Petitioner has overlooked the Act of June 7, 1934, c. 424, Sec. 1, 48 Stat. 912 which amended the Bankruptcy Act to make claims for future rent provable in reorganization proceedings. This amendatory Act made the rule of the *Manhattan Properties, Inc.*, case inapplicable to the McCrory reorganization proceeding. Cf. *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433; *In re Owl Drug Co.*, 12 F. Supp. 447

Certainly, whatever the impact of the bankruptcy court's decisions on those directly interested in the estate of the bankrupt, petitioner clearly has no standing to complain of the exercise of the court's discretion in not withholding confirmation. The court properly considered only the interests of those having claims against the estate. Petitioner has no interest in whether the court properly decided where the interests of the creditors and stockholders of the debtor lay. Her interest is merely in the outcome of her equity suit. The action of the bankruptcy court in confirming the plan does not prevent her from obtaining any relief to which she may be entitled in the equity suit. The bankruptcy court held that her equity claim had no place in the bankruptcy proceeding and the circuit court of appeals held that she had no standing to appeal from the order confirming the plan. Consequently, her meager participation in the bankruptcy proceedings did not result in any adjudication which would prevent her from attacking in her independent equity suit the settlement upon which the plan is based. *Cf. Stoll* v. *Gottlieb,* 305 U. S. 165.

(D. Neb.). The lack of substance to the claim is further illustrated by the lack of any specific or substantial allegation of fraud and by the failure to take into account the terms of the plan transferring to Goldberg Properties Trust the right to enforce the obligations of the Goldberg Estate as guarantor (R. 42).

The decision that petitioner's remedy, if any, lay in the equity suit rather than the bankruptcy court can by no means be regarded as an infringement of her constitutional rights. The due process clause does not assure the right to litigate claims in a particular forum to the prejudice of the expeditious conduct of proceedings properly before the court.

CONCLUSION

The decision of the court below with respect to the appeal from the order confirming the plan is correct, and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROGER S. FOSTER,
Solicitor,
W. VICTOR RODIN,
G. GALE ROBERTSON,
Attorneys,
Securities and Exchange Commission.

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